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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

WILLIAM JAY PRICE,

Plaintiff and Appellant,

v.

AUDREY KING et al.,

Defendants and Respondents.

F075918

(Super. Ct. No. 15CECG03207)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Donald S. Black, Judge.

William Jay Price, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Danielle F. O'Bannon, Assistant Attorney General, Alberto L. Gonzalez and Jeremy C. Thomas, Deputy Attorneys General, for Defendants and Respondents.

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Plaintiff William Jay Price appeals from an order granting relief from defaults entered against defendants. Defendants contend the order is nonappealable and request

* Before Franson, Acting P.J., Peña, J. and DeSantos, J.

this court to dismiss the appeal. As explained below, the order granting relief is not appealable.

We therefore dismiss the appeal.

BACKGROUND

At the time of the incident giving rise to this lawsuit, plaintiff was 67 years old and was a patient at the Coalinga State Hospital and a member of the general population. Plaintiff alleges he made four verbal complaints to staff about violent interactions with another patient, but that patient was not segregated from the general population. Subsequently, the other patient, Lavern Sykes, followed plaintiff into the bathroom out of sight of staff and hit plaintiff with a closed fist. The attack caused permanent blindness in plaintiff's left eye and severe bruising from his eye down to his neck and on his chest and right arm.

Plaintiff alleges that three months later, defendants moved plaintiff to another unit in retaliation for complaining about the assault. In comparison, defendants rewarded Sykes for assaulting plaintiff by leaving him in his unit with his unit job and in Phase IV Group. Plaintiff alleges the staff allowed the assault to happen and rewarded Sykes under color of authority.

In May 2015, plaintiff filed a complaint under 42 United States Code section 1983 for denial of constitutional rights under color of authority and petition for writ of habeas corpus. He requested \$50,000 in damages for loss of eyesight in his left eye, \$50,000 in punitive damages based on malice, and the removal of Sykes from Phase IV Group.

On July 14, 2016, proofs of service were filed showing the summons and complaint were served on defendants Audrey King, director of the department of police services; Klayton Smith, Ph.D.; and unit supervisor Barbara Rodriguez. On September 30, 2016, plaintiff filed a request for entry of default using mandatory Judicial Council of California form CIV-100 (rev. Jan. 1, 2007). The clerk of the superior court entered the default against defendants King, Smith and Rodriguez that same day.

In November 2016, the trial court granted plaintiff's oral request to dismiss defendant Pam Ahlin, Jennifer Brazier, Ph.D., and Lavern Sykes without prejudice. In January 2017, defendants King, Smith and Rodriguez filed an answer.

In February 2017, the trial court issued a written order denying without prejudice plaintiff's request to enter a default judgment on declarations. The order also struck the answer filed by defendants on the ground their default had been entered in September 2016, before the answers were filed. The order directed plaintiff to submit a new default package correcting the errors noted in the order.

In March 2017, an attorney representing defendants filed a motion to set aside defaults based on Code of Civil Procedure section 473. A copy of the motion is not included in the clerk's transcript designated by plaintiff. In April 2017, plaintiff filed an objection to the motion to set aside default.

In May 2017, the trial court issued a tentative ruling stating relief under Code of Civil Procedure section 473, subdivision (b) based on an attorney affidavit of fault was mandatory and, because no default judgment had been entered, the motion was timely. On May 31, 2017, the court issued a minute order adopting the tentative ruling as an order setting aside the defaults. In June 2017, plaintiff filed a notice of appeal from the order of May 31, 2017.

DISCUSSION

"Established California decisional law provides that no appeal lies from an order granting a motion to vacate a default upon which no default judgment has been entered. (*Leo v. Dunlap* (1968) 260 Cal.App.2d 24, 25 [66 Cal.Rptr. 888]; cf. *Winter v. Rice* (1986) 176 Cal.App.3d 679, 682 [222 Cal.Rptr. 340] [order denying motion to vacate clerk's entry of default].) Also, Code of Civil Procedure section 904.1, which contains a lengthy list of appealable orders and judgments, does not allow an appeal to be taken from an order granting a defendant's default relief motion. In the present case, defendant's default was entered by the clerk of the superior court on April 6, 1988.

However, no default judgment was ever entered. As Division Seven of this appellate district noted in *Winter v. Rice, supra*, 176 Cal.App.3d at page 683, ‘[T]his court has no power to make appealable an order which is nonappealable. [Citation.]’ Accordingly, plaintiff’s purported appeal from the order granting defendant’s motion to vacate entry of default must be dismissed.” (*Veliscescu v. Pauna* (1991) 231 Cal.App.3d 1521, 1522-1523.)

Here, no default judgment was entered against defendants. It follows from the principles set forth above that the May 31, 2017, order granting defendant’s motion to set aside the defaults based on Code of Civil Procedure section 473 is not appealable. Therefore, applicable law requires this court to dismiss the appeal.

DISPOSITION

The appeal from the order granting defendants’ motion to set aside the defaults is dismissed. The parties shall bear their own costs on appeal.